REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C586/2019

In the matter between:

INDAWO CAPE (PTY) LTD **Applicant**

and

MARCIANO ANDRADE **First Respondent**

BUILDING INDUSTRY BARGAINING COUNCIL **Second Respondent**

COMMISSIONER SIFQUIBO COLIN RANI N.O. **Third Respondent**

Date heard: 2 September 2021 by means of virtual hearing

Delivered: 7 February 2022 by means of email; deemed received 10.00hr on 8 February 2022

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number BIGH224-18. In terms of the award, the third respondent (the Commissioner) found the dismissal of the first respondent (Andrade) to be

procedurally and substantively unfair and awarded him an amount equal to three months' salary being an amount of R95 400.00 to be paid no later than 16 September 2019.

[2] The applicant was employed as a Sales Consultant since 23 May 2013. He was dismissed on 25 April 2019 after being charged with:

"Gross negligence in the performance of your duties in that you missed the Golf Park tender deadline of the 26th March and this resulted in Indawo potentially missing the opportunity to tender as you were under the impression it was only due on 29th of March 2019.

There are very clear company rules regarding the completion and timelines for tenders. Following special arrangements made by management to be able to tender, your negligence left no time to properly assess, price and complete the tender and only the smaller job could be properly cost whereas the bigger job could not be costed properly. This potentially caused harm to the company and could still cause harm as future cost implication could surface as a result.

"On the Absa project you undertook on the 21 of March 2019 to provide a timeline to management to explain how the project evolved. This you would do over the weekend as this was needed by management for upcoming meetings on a project that is already problematic. This was not received from you on the morning of the 25th as you undertook yourself to finish it over the weekend and was received by management only on the 25th of March 2019 at 21hr55. This left little or no time for management to prepare and peruse prior to the meeting on the morning of the 26th of March 2019."

[3] The grounds for review in the founding affidavit include the following:

3.1 In accepting the seriousness of missing deadlines for submitting tender documents yet concluding that Andrade made a genuine mistake and his conduct did not constitute gross negligence, the Commissioner committed a gross irregularity;

3.2 There was no basis for the Commissioner to trivialize the seriousness of the misconduct;

3.3 An employee's conduct can amount to gross negligence given the seriousness of the omission itself;

3.4 The Commissioner placed more emphasis on the First Respondent's remorse and disciplinary record and failed to appreciate the nature and importance of the rule breached and failed to apply his mind to and weigh up all materially relevant factors.

[4] In the supplementary affidavit, the applicant raised a jurisdictional point i.e. that the second respondent (the Bargaining Council) had no jurisdiction to hear the dispute referred to it by Andrade. It relies on the *BIBC (Cape of Good Hope): Extension of Consolidated Collective Agreement* whose scope of application does not cover clerical employees, supervisory staff and administrative staff, unless hourly paid. The bargaining unit which is covered by the collective agreement, and governs terms and conditions of employment excludes more senior employees, as is the norm. The said collective agreement also question prohibits industrial action for the duration of the collective agreement, and provides for procedures for resolution of non-compliance disputes. That there is an annexure to it which deals with dispute resolution is in my view neither here nor there.

[5] A second ground in the supplementary affidavit dealt with the inconsistency point raised by the applicant in arbitration. However, the Commissioner did not find for the applicant on the inconsistency point and these averments and submissions are therefore irrelevant.

[6] The function of this collective agreement i.e. to regulate terms and conditions of employment of a bargaining unit and compliance with it, has no bearing on the fact that the BIBC is a CCMA accredited bargaining council in terms of section 127[1] of the Labour Relations Act, and has jurisdiction to arbitrate dismissal disputes[2] between employees and employers in the sector. I note that such accreditation does rely on the extension of its collective agreement to non-members in the sector. There is no suggestion that this requirement has not been met. Reliance on the collective agreement to seek a jurisdictional review of the Award in question is thus misplaced.

[1] Read with section 128 and 142 of the LRA.
[2] GenN 681in GG 40359 of 21 October 2016

[7] The applicant is thus left with the remainder of the grounds of review set out in the founding affidavit. These in my view do not evince a basis to review the Award. In the Court's view, a reading of the Award and the transcript of the arbitration proceedings does not meet the test for review as set out in **Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)**[3] :

" [25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[8] The Commissioner took into account the disciplinary record of Andrade, his remorse and considered with reference to the evidence and the law that the offence could not be considered as one of gross negligence. In my judgment The Award of three months compensation falls within the bounds of reasonableness. The applicant took no issue with the Commissioner's finding that the dismissal was procedurally unfair. I therefore make the following order, taking into account the *Zungu* principles on costs:

Order

1. The review application is dismissed.
2. There is no order as to costs.

[3] 2013 (6) SA 224 (SCA) ((2013) 34 ILJ 2795; [2013] ZASCA 97)

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Eugene Benade instructed by Barnaschone Attorneys

First Respondent: Micheal Donen SC instructed by Bagraims Attorneys